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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

L.C., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D056941 (San Diego County Super. Ct. No. J517375)
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Real Party in Interest.	

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing. Yvonne E. Campos, Judge. Petition denied.

L.C. seeks review of a trial court order setting a hearing under Welfare and Institutions Code[1] section 366.26 to select and implement a permanency plan for his son L.C., Jr. (LCJ or baby.) He contends the court abused its discretion when it terminated his reunification services at the six-month status review hearing.

FACTUAL AND PROCEDURAL BACKGROUND

LCJ was born in January 2009. At birth, LCJ tested positive for cocaine and marijuana, as did his mother, Sylvia J.[2] The court sustained jurisdiction under section 300, subdivision (b). Although concerned by L.C.'s 20-year criminal history, which included drug-related convictions, the court placed LCJ in L.C.'s care under a plan of family maintenance services on the recommendation of the San Diego County Health and Human Services Agency (the Agency).[3]

The visiting public health nurse was impressed by L.C.'s attention to the baby and his interest in parenting. The social worker noted L.C. comforted the baby and attended to his needs. However, in April 2009 L.C. provided a drug test sample that was "positive/diluted for PCP." A drug test result in May was "negative/diluted for Creatinine/SPGR."

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1 Unless otherwise specified, further statutory references are to the Welfare and Institutions Code.

2 Sylvia does not petition for review of the order setting the section 366.26 hearing. She is mentioned when relevant to the issues raised in this proceeding.

3 L.C. and Sylvia did not live together. L.C. had not had much contact with Sylvia in the seven months preceding LCJ's birth.

In June 2009, at the request of the guardian ad litem and the Agency, the court detained LCJ with a paternal aunt (Aunt) and ordered L.C. to participate in the Substance Abuse Recovery Management System (SARMS). In July the court removed LCJ from L.C.'s custody and placed the baby with Aunt. (§ 387.) L.C.'s case plan required him to complete a parenting class, meet with in-home support staff to demonstrate his parenting skills and participate in SARMS.

In the Agency's initial report for the six-month review hearing, the social worker recommended that the court continue reunification services to L.C. until the 12-month hearing date, which was scheduled for June 28, 2010. The social worker reported L.C. had had unsupervised visits with LCJ each week since October. He had finished his parenting program, and was doing well in SARMS and with in-home parenting services. However, L.C. recently tested positive for opiates consistent with codeine use. He stated he took his sister's prescription medication to alleviate his chronic back pain. SARMS viewed his unauthorized use of a painkiller as a treatment issue, not as a relapse. The social worker believed a further assessment of L.C.'s recovery status was necessary before LCJ could be returned to his care.

Sylvia tested positive for cocaine throughout the dependency proceedings. In an addendum report the social worker stated Sylvia had a positive test for cocaine on January 25, 2010, and was discharged from her substance abuse treatment program. Later that day, Sylvia and L.C. had an altercation at Sylvia's home. Sylvia claimed L.C. had been drinking. She said L.C. grabbed her and dragged her by the hair down the stairs. Sylvia's left wrist was swollen, scratched and bruised.

L.C. said Sylvia had been drinking. He admitted he grabbed her hair but maintained he did not push her down the stairs. L.C. stated "he did not want to leave [Sylvia's home] because he does not like to drive if he has had even one beer to drink."

The maternal grandmother said she saw L.C. drink beer on several occasions. He visited Sylvia often and bought alcohol for her. During the holidays, grandmother drove L.C. to the liquor store where he bought "a 12-pack."

At the six-month review hearing, the court admitted the Agency's reports in evidence. The social worker testified the Agency viewed L.C.'s nonauthorized use of a painkiller as a relapse. Further, L.C. increased the risk to the baby by associating with Sylvia, who had continued to use cocaine. The recent incident of domestic violence was another risk factor. The social worker stated L.C. had not made substantial progress with his case plan. He made poor decisions, which indicated he had not internalized his education. The social worker recommended the court terminate reunification services to both parents.

The court stated L.C.'s and Sylvia's lives were dysfunctional. In L.C.'s case, this dysfunction included consuming alcohol, purchasing alcohol and sharing it with Sylvia, engaging in an incident of domestic violence, and taking a painkiller that was not prescribed for him. The court found there was not a substantial probability L.C. would reunify with LCJ within the three months remaining in the 12-month reunification period. The court terminated services and set a section 366.26 hearing.

L.C. petitions for review of the trial court's order under California Rules of Court, rule 8.452. He requests this court reverse the order setting a section 366.26 hearing. On

March 19, 2010, we issued an order to show cause. The Agency responded and the parties waived oral argument.

DISCUSSION

L.C. contends the court abused its discretion when it terminated his reunification services and set a section 366.26 hearing. L.C. asserts he complied with his case plan and made substantial progress. He argues his one-time use of a painkiller for back pain, a domestic violence incident that did not result in any charges against him, and the social worker's subjective belief he had not internalized treatment, did not constitute sufficient justification to terminate services and set a section 366.26 hearing.

If a child is under three years of age on the date of the initial removal, the court may schedule a hearing under section 366.26 if it finds by clear and convincing evidence the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan,. (§ 366.21, subd. (e).)

L.C. argues this case is similar to *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 504-506 (*Rita L.*), in which a division of this court reversed an order terminating reunification services to a recovering parent who had taken a nonauthorized prescription Tylenol tablet for a headache. The trial court found that the parent had otherwise performed in an exemplary manner and but for the ingestion of a prescription painkiller would have regained custody of her child. (*Id.* at p. 506.) L.C. contends the court abused its discretion when it relied on the social worker's opinion that his use of an unauthorized prescription painkiller was a relapse.

He points out that SARMS stated he was a "model client" and did not consider his use of the painkiller to be a relapse. However, the record shows the court could reasonably determine L.C. had not resolved his substance abuse issues. L.C. resumed his relationship with Sylvia, who had continued to use cocaine throughout the dependency proceedings. Witnesses saw L.C. drinking and purchasing alcohol for Sylvia. He admitted that he had been drinking before the domestic violence incident. Further, L.C.'s history was problematic. L.C. tested positive in April 2009 for PCP. Drug tests in May and June were diluted. He had been in and out of prison over a 20-year period. In addition to burglary, vehicle theft and possession of a firearm, L.C. had been convicted of drug offenses, including possession of cocaine base for sale and driving while intoxicated. Within this context, the court could reasonably conclude that L.C.'s one-time use of a prescription painkiller was a significant indicator that L.C. had not resolved his substance abuse problems despite his compliance with SARMS.

L.C. asserts the domestic violence charges against him were dropped and argues the incident was not a valid factor for the court's consideration. However, regardless of any decision to dismiss or pursue a criminal charge against L.C.,[4] the court could reasonably consider the facts and circumstances of the domestic violence incident in determining whether L.C. had made substantial progress in mitigating the protective risks to LCJ. The record shows L.C. was at Sylvia's home; they both had been drinking; there was an altercation in which Sylvia was injured; and L.C. admitted he pulled Sylvia's hair.

4 The trial court found that it was too early to know the outcome of the criminal proceedings.

The court could reasonably conclude that an incident of domestic violence between LCJ's parents, fueled at least in part by alcohol use, presented a substantial, unmitigated risk of harm to the baby.

We are also not persuaded by the argument the court abused its discretion when it relied on the social worker's statement that L.C. had not "internalized" his substance abuse treatment. L.C. contends this case is similar to *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1751 (*Blanca P.*). *Blanca P.* concerned a problematic record on a subsequent petition alleging sexual abuse of a three-year-old by her father. (*Id.* at pp. 1742-1747, 1754.) The mother faithfully attended therapy and counseling services; however, she did not believe her husband had sexually molested their daughter. Other than the social worker's testimony the mother had not "internalized" general parenting skills after 18 months of services, there was a lack of evidence of detriment. (*Id.* at pp. 1738, 1751.) A division of this court concluded "[t]he failure to 'internalize' general parenting skills is simply too vague to constitute substantial, credible evidence of detriment," and issued a peremptory writ of mandate directing the trial court to vacate its findings of detriment and to hold another review hearing. (*Id.* at p. 1751.)

Blanca P. does not assist L.C. here. The circumstances of this case are different. When the social worker stated L.C. had not "internalized" his substance abuse treatment, she was referring to L.C.'s continuing pattern of substance abuse and denial. The social worker's opinion that L.C. had not made substantive progress with his case plan was not based on a vague subjective statement of opinion, but on verifiable observations of L.C.'s actions. The social worker could reasonably infer L.C. resumed a pattern of behaviors

that increased the protective risks to LCJ, rather than implementing what he had learned in substance abuse treatment. To the extent the court relied on the social worker's opinion L.C. had not "internalized" his treatment, the court did not abuse its discretion.

The court may terminate reunification services at the six-month hearing when the parent of a child under the age of three has "made little or no progress in [his or her] service plan[] and the prognosis for overcoming the problems leading to the child's dependency is bleak." (*Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 612.) While L.C. emphasizes his compliance with SARMS and the progress he made before December 2009, the evidence at the time of the six-month review not only shows that L.C. failed to mitigate the protective risks to LCJ, but his current behaviors had increased the risk of harm to his son. We conclude the court did not abuse its discretion when it terminated L.C.'s reunification services and set a section 366.26 hearing.

DISPOSITION

The petition is denied. The request for a stay is denied.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.